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According to the United States Circuit Court, for the District of South Carolina, an owner of land on navigable stream is not without remedy for damages to his property caused by the building of dams and improvements to the stream, undertaken by the United States government. That court held, in Williams v. United States, that where the United States government, in the proper exercise of its powers, has undertaken the improvement of the navigation of a river, and by means of the dams and other works therein built has caused a permanent rise in the level of the water of such river, resulting in the flooding of rice land adjacent, which was previously protected by embankments, and drained into the river, so as to render it permanently valueless for any purpose, such action constitutes a taking of the land for public purposes, within the meaning of the fifth amendment to the constitution, and the owner is entitled to recover just compensation therefor.

It was the rule at common law that a *mittimus* in order to justify the restraint of a prisoner must state the crime with which he is charged. The Superior Court of Cook County, Chicago, as we gather from the *Chicago Legal News*, while affirming this proposition in a recent *habeas corpus* case—People v. Murray—laid down an addition to it, as upheld by the authorities, the holding being that when one is taken from his home or from the street charged with a crime, that while yet the presumption of innocence remains with him, the precept under which he is held must show the offense with which he is charged and the authority which justifies it; but that after regular trial and sufficient judgment, the public officer whose duty it is to imprison, finds his justification in the judgment of the court, and no writ is necessary to compel him in the performance of this public duty. The form of a civil judgment directs an execution, but no such direction is contained in the well established forms of criminal judgment, although the judgment contains a direct order and command to the warden himself.

The United States Supreme Court has just rendered an opinion in the case of Austin v. State of Tennessee, involving the validity of a law of that State regulating the sale of cigarettes. The law was attacked as an infringement of the right of congress to regulate interstate commerce. The Supreme Court of Tennessee upheld the law, and the decision of the highest federal tribunal now rendered sustains that conclusion, though not without disapproval of some of the positions taken, and then on a very narrow margin, four out of nine members joining in a dissenting opinion, and another member of the court (Justice White), placing his assent on grounds different from those announced by Justice Brown who handed down the opinion of the majority.

The case grew out of the importation of cigarettes into Tennessee from North Carolina.. They were taken into the State in the ordinary sized cigarette package, and these packages were loosely thrown into baskets which were uncovered. The claim was made that these cigarette packages were what are known to the law as original packages, but without clearly defining an original package, the court held that it was clear that such packages could not be so considered.

Justice Brown, in passing on the case, said that the packages were obviously made up with the view of evading the law, and as he spoke he held one of the little cigarette cases up to the view of his auditors. On this point the decision of the State court—to the effect that the packages were not original—was fully confirmed.

On another phase of the case, the State court was not so fully indorsed. The Tennessee court had held that the cigarettes were not an article of commerce. With this view, Justice Brown took issue, and he delivered quite a dissertation on the subject. Whatever is an object of barter and sale is, he said, an article of commerce, and must be so recognized. Tobacco has been such an article for four hundred years.

It had been made the subject of taxation and, indeed, had become more widely scattered than any other vegetable. Probably, he added, no other vegetable had contributed so much to the comfort and solace of the human race. This being the case, it was en-

tirely beyond bounds to say that tobacco was not an article of commerce.

He then took notice of the claim that cigarettes are an especially harmful form of tobacco, and while he conceded that this might be the case, he remarked that this claim was of comparatively recent origin. Still, he held that cigarettes are as much a subject of State regulation as is liquor, and he further held that while no State law could prohibit importation in original packages, it was entirely competent for a legislature to regulate the sale because of general belief in the deleterious effect of the article.

There was a dissenting opinion by Justice Shiras in which the Chief Justice and Justices Brewer and Peckham joined. They based their dissent on the theory that congress has exclusive control of interstate commerce.

NOTES OF IMPORTANT DECISIONS.

SALES—DELIVERY TO CARRIER—TITLE—INSPECTION AND REJECTION—DETERIORATION IN TRANSIT.—In Mobile Fruit & Trading Co. v. McGuire, 83 N. W. Rep. 833, decided by the Supreme Court of Minnesota, it was laid down that if no place of delivery is specified in a contract of sale, and there are no circumstances showing a different intent, the general rule is that the articles sold are to be delivered at the place where they are at the time of sale, and that their delivery to the proper carrier is a delivery to the buyer, and that the title passes to him subject to his right of inspection and rejection of the goods on arrival, if found not to be in accordance with the contract. It was held, however, that the buyer, unless otherwise agreed, assumes the risk of deterioration in the goods necessarily incident to the course of transportation. The court cited Benj., Sales, 127, 144, 147; Janney v. Sleeper, 30 Minn. 473, 16 N. W. Rep. 365; Kessler v. Smith, 42 Minn. 494, 44 N. W. Rep. 794; Schwartz v. Church of the Holy Cross, 60 Minn. 183, 62 N. W. Rep. 266; English v. Commission Co., 15 U. S. App. 218, 6 C. C. A. 416, 57 Fed. Rep. 451; Gates v. Packing Co., 78 Cal. 439, 21 Pac. Rep. 1; Lord v. Edwards, 148 Mass. 476, 20 N. E. Rep. 16, 2 L. R. A. 519; Mee v. McNider, 109 N. Y. 500, 7 N. E. Rep. 424.

NEGLIGENCE—PROXIMATE CAUSE.—In the recent case of Evansville, etc. R. R. v. Welch, 58 N. E. Rep. 88, decided by the Appellate Court of Indiana, it appeared that the defendant maintained a depot and station in the town of Farmersburg, State of Indiana, the south end of said station abutting on the main street of said town, known as Liston street. It was alleged "that there are a large number of buildings in said town on both of appellant's tracks and along the line of said Liston street, and at and near appellant's said station, and that at all times of day large numbers of persons pass to and from the east and west portions of said town along said street and across appellant's said tracks. * * * In order to make said crossing safe for persons passing along said street it was necessary that appellant keep the view along said tracks unobstructed," so that persons crossing said tracks could observe the approach of locomotives and cars. It was further alleged that on a certain day one William Bostic attempted to approach said station and cross said track, for the purpose of taking a train; that there were and had been for a long time theretofore a large number of flat cars and box cars carelessly and negligently placed on a side track obstructing the view; that while crossing the tracks a "wild engine" was run at a dangerous, reckless and unusual rate of speed over the main track, which struck said Bostic as he attempted to cross, killed him instantly and hurled his body at and against appellee, the plaintiff below, who was standing upon the platform of the station; that appellee thereby sustained personal injuries, to recover damages for which the suit was brought. It appeared that the plaintiff was engaged in the livery stable business; that he was present on the platform, according to his custom, for the purpose of soliciting customers who might arrive on an expected train, "all of which he does with the knowledge and consent of appellant." The Appellate Court of Indiana held that no recovery could be had, because the injury to the plaintiff was not the proximate result of defendant's negligence.

The reasoning of the court is largely founded upon that of the Supreme Court of Pennsylvania in Wood v. Pennsylvania R. R., 177 Pa. 306, 35 L. R. A. 199.

BROKERS—EXCHANGE OF LAND—COMMISSION.—In Roche v. Smith, 58 N. E. Rep. 152, decided by the Supreme Judicial Court of Massachusetts, it was held that where an owner employed a broker to exchange property "for any other suitable property," and such broker produced a party with whom the owner contracted to exchange for property which he accepted as "suitable," but such exchange was never made because of a defect in the customer's title, the broker is entitled to his commission, provided he was ignorant of the defect in the title.

It was further held that where an owner of real estate has contracted to exchange it for property owned by another, whom a broker whom he had employed has produced, the contract providing that the land should be conveyed by each to the other within twenty days by a good and sufficient warranty deed, such owner may recover from the other party in interest the amount of the commissions paid to the broker, where such other party is unable to convey a good title to his property. The court said in part:

"It was held in Knapp v. Wallace, 41 N. Y. 477, where the broker was employed to find a person to convey land to be paid for in money, and in Kalley v. Baker, 132 N. Y. 1, 29 N. E. Rep. 1091, where the broker was employed to find a person to convey land to be paid for by a conveyance of other land—that is to say, to effect an exchange—that where the principal makes a valid agreement with the customer produced by the broker, the broker has earned his commission, even if it turns out that the customer cannot make agood title and the land is not conveyed, provided the broker acted in good faith in the matter. In the opinion of a majority of the court, those cases were rightly decided. The question is the same in the two cases; the only difference is that in one case payment is to be made in money, in the other by a conveyance of other land. Where the broker is employed to get a customer to buy and pay for his principal's land, and it turns out that the customer is not able to pay for the land, it is settled that his inability does not deprive the broker of his commission, provided the principal made a valid and binding agreement for the sale of the land with the customer produced by the broker. Ward v. Cobb, 148 Mass. 518, 28 N. E. Rep. 174; Burnham v. Upton, 174 Mass. 408, 409, 54 N. E. Rep. 873. The ground on which this is settled is that, by entering into a valid contract with the customer produced by the broker, the principal accepts the customer as able, ready and willing. In such a case the decision would have to be the other way were it not that, by entering into the contract with him, the principal accepts the customer produced by the broker. What the broker is employed to do is to produce a customer who will buy and pay for his principal's land. Fitzpatrick v. Gilson (Mass.), 57 N. E. Rep. 1000. If it turns out that the customer produced by the broker is not able to pay, and does not pay, for the land, the broker has not performed his duty, and has not earned his commission; and it is only because the principal accepts the customer, by entering into a valid contract with him, that it is held, in cases like Ward v. Cobb, that the broker has earned his commission. Coleman's Ex'r v. Meade, 13 Bush., 358; Donohue v. Flanagan (City Ct. N. Y.), 9 N. Y. Supp. 273; Francis v. Baker, 45 Minn. 83, 47 N. W. Rep. 452; Wray v. Carpenter, 16 Colo. 271, 27 Pac. Rep. 248; Lockwood v. Halsey, 41 Kan. 166, 21 Pac. Rep. 98; Springer v. Orr, 82 Ill. App. 558. The law is settled in other jurisdictions in accordance with Ward v. Cobb, see Francis v. Baker, 45 Minn. 83, 47 N. W. Rep. 452; Wray v. Carpenter, 10 Colo. 271, 27 Pac. Rep. 248; Love v. Miller, 53 Ind. 294; and generally that a broker makes out a case for a commission earned by proving a contract made. See Cook v. Fiske, 12 Gray, 491; Rice v. Mayo, 107 Mass. 550; Keys v. Johnson, 68 Pa. St. Rep. 42; Veazie v. Parker, 72 Me. 443; Conklin v. Krakauer, 70 Tex. 735, 739, 11 S. W. Rep. 117. The same rule obtains when the principal wants to buy in place of wanting to sell. Where the principal wants to buy 100 bushels of wheat at a price named by him, and employs a broker to get him the wheat at that price, the broker earns his commission when he produces a customer and his principal makes a valid, binding agreement with the customer for the wheat; and the broker's right to his commission is not affected by the inability or refusal of the customer to deliver the wheat. In such a case the broker has not produced a customer able to supply his principal with the wheat, and would not have earned his commission had it not been that his principal, by contracting with the customer, had accepted him. In such a case the principal has a right to full compensation for the loss of his bargain by recovering damages for breach of the contract, and in the event which has happened the commission paid the broker is paid for that. The rule is the same when the broker is employed to get for his principal a certain piece of land. If through the broker's efforts a binding contract is made between his principal and the owner of the land, the broker has earned his commission, and his right to it is not affected by the fact—if it turns out to be the fact—that the owner, the broker's customer, cannot make a ood title. The principal has his remedy by recovering full damages for the loss o his bargain in an action at law on the contract, and in the event which then happens it is for that which the commission is paid. We have no doubt that in this commonwealth a party has a right to recover full damages for the loss of his bargain under a contract for the exchange or purchase of land where it turns out that the party who agreed to convey the land has not a good title. Bringham v. Evans, 113 Mass. 538; Railroad Corp. v. Evans, 6 Gray, 25, 33."

TRESPASS—JOINT LIABILTY—FLOWAGE.—In Bonte v. Postel, decided by the Court of Appeals of Kentucky it was held that where various property holders who ran water from their premises into an underground pipe, which ran into an open sewer along plaintiff's wall, flooding his premises, acted entirely independently of each other, none of them believing that any injury would result therefrom to plaintiff's property, they were not joint trespassers, and no one of them is liable for the acts of the others. The court said in part:

"The principle of law is well established that where two or more persons unite in an act which constitutes a wrong to another, intending at the time to commit it, or doing it at a time and under circumstances that fairly charge them with intending the consequences thereof, the law compels each to assume and bear the responsibility of the misconduct of all. See Cooley, Torts, p. 133. But where two or more persons acting independently, without concert, plans or other agreement, inflict a damage or cause an injury to another person, one of such persons cannot be held liable for the acts of the others. Authorities to support both propositions are abundant, and

we are of opinion that this case belongs to the latter class, as there is no evidence conducing to show that the various property holders who ran water from their premises into the underground pipe in the alley which emptied into the open sewer which ran along appellant's wall either acted in concert in so doing, or believed that any injury would result therefrom to appellant's property. Each acted entirely independent of the others. The cases relied on by appellant to support his contention belong to the first class, and there are numerous and very respectable authorities which support the latter proposition. Black's Law Dictionary defines 'joint trespass' as 'two or more persons who unite in committing a trespass.' And in the case of Ferguson v. Terry, 1 Mon. 96, it was held 'that none were liable for trespass committed by others unless they gave authority, command, or assent to it.' The proof showed in this case that the trespassers were separate and distinct. In Bard v. Yohn, 26 Pa. St. 482, it was held 'that where two persons acted each for himself, so as to produce an injury to the plaintiff, they could not be sued as joint trespassers, unless it appeared that they acted in concert.' In Ellis v. Howard, 17 Vt. 330, the court said: 'There must be a privity between the wrongdoers in order that each may be held responsible for the whole of the damages.' In Gallagher v. Kemmeper, 144 Pa. St. 509, 22 Atl. Rep. 970, which was an action to recover damages for injuries to plaintiff's land for deposits of mine water and dirt accumulating thereon from the defendant's operation on a creek having its source some four or five miles off in the mountains above plaintiff's land, it appeared in the proof that the Highland Coal Company had been mining coal several miles above on the same stream, and that this company, as well as defendant, dumped the refuse of its mines directly into the creek. The court said: 'It is true that the injury complained of may have been caused in part by the operations of the Highland Coal Company, conducted contemporaneously with the operations of defendant's mines, and that it would be difficult, if not quite impossible, to separate and ascertain, definitely and certainly, the proportion of the whole damage done by each of these operations respectively. But these several operations were entirely independent of each other. They were several miles apart, and the ownership and control were wholly distinct and separate. There was no concert of action or common purpose or design which would support the theory of joint injury.' In the case of Coal Co. v. Richard's Admrs. 57 Pa. St. 142, which was a case in which the mill-dam of the plaintiff had been filed by the deposit of coal dirt from different mines, which had been washed down by the stream from the mines above of several owners, the plantiff sought to charge the defendants below with the whole injury caused by filling up his basin; the substance of the complaint being that, if at the time the defendants were throwing coal dirt into the river the same was being done at the other collieries, and the defendants knew of this, they were liable for the combined result of the series of deposits of dirt from the mines above. In this case the court held that, where a tort was severally committed without concert with others at the time of commission, it did not afterwards become joint because its consequence united with other consequences; that without concert of action no one suit could be maintained against the owners of the collieries. They support the conclusions reached in that case with numerous authorities. In the case of Miller v. Ditch Co., 87 Cal. 430, 25 Pac. Rep. 550, the plaintiff was the owner of a tract of land near where a canyon came out of the mountains, but did not reach his land, and naturally the waters of the canyon would not flow upon his land; but defendants, by means of different ditches, turned foreign water into the canyon, and the commingling water from said ditches passed through said canyon, and by cutting new channels, etc., flowed out on plaintiff's land, covering part of it with sand and debris. The ditches were not owned jointly by all of the defendants. Each ditch was operated by part only of the defendants, who had no interest in the other ditches. In that case the court said: 'It is clear that the rule, as established by the general authorities, is that an action at law for damages cannot be maintained against several defendants jointly when each acted independent of the action of the other, and there was no concert or unity of design between them. * * * The tort of each defendant was several when committed, and did not become joint because afterwards its consequences united with the consequences of several other torts committed by other persons. * * * If it were otherwise, * * * one defendant, however little he may have contributed to the injury, would be liable for all the damage caused by the wrongful acts of all the others, and would have no remedy against them because no contribution can be enforced between joint-feasors.' These authorities, we think, very conclusively establish the doctrine that without a common intent and co-operation there can be no joint liability in the commission of several trespasses, and section 12 of the Kentucky statutes does not change the common-law form of proceeding, or authorize a joint action for several trespasses, but only authorizes several verdicts and several judgments against each of the several joint trespassers in a joint action. See Ferguson v. Terry, 1 B. Mon. 96; Henry v. Sennett, 3 B. Mon. 311."

MUNICIPAL CORPORATION — LOCATION OF SMALLPOX HOSPITAL — POLICE POWER.—In Frazer v. City of Chicago, 57 N. E. Rep. 1055, decided by the Supreme Court of Illinois, it was held that, where a smallpox hospital is rightfully located and well conducted by a municipality, there can be no recovery by a property owner for depreciation in the value of his property caused by its location in his neighborhood; the estab-

lishment of such hospitals being within the police power of the municipality, and the city and village act of Illinois specially authorizing municipalities to erect and establish hospitals and control and regulate the same. It was further held that the location by a city of a smallpox hospital on land owned by it is not, as to adjoining property, a taking of private property, nor a physical injury, entitling adjoining landowners to damages. The court said in part:

"But finally appellants contend that it is an unreasonable, unusual and extraordinary use of property to utilize it for the segregation of contagious diseases, and cite in support thereof Kobbe v. Village of New Brighton (Sup.), 45 N. Y. Supp. 777, City of Baltimore v. Fairfield Imp. Co. (Md.), 39 Atl. Rep. 1081, 40 L. R. A. 494, and Com. v. Alger, 7 Cush. 86. Under the express delegation of power by the legislature, we cannot hold that the application of property for the use of a smallpox or other hospital is such an unusual or unreasonable use of property as would take it out of the police power of the city, so as to render it liable for such application, when, as here, it is conceded that the pest house is rightfully located and well conducted. In the case of City of Baltimore v. Fairfield Imp. Co., *supra*, the complainants sought by injunction to restrain the city of Baltimore from placing and keeping on a twenty-acre tract of land owned by the city a woman afflicted with leprosy, which land of the city adjoined lands of the complainants. There is a wide difference between the establishing and maintaining of a hospital for the treatment of disease, and in appropriating a piece of property for the keeping of a single patient by an unskilled laborer and his family, having no knowledge of the disease of leprosy, with which the patient was afflicted. The facts appearing in that case might well have justified the interference by the court, by injunction, to restrain the use, having reference to all the surrounding conditions, and yet not militate against the view we have taken, that annoyance or damage resulting from the rightful location and proper conducting of the hospital in question offers no basis for relief in damages."

CONSTITUTIONAL AMENDMENTS TAXING MORTGAGES.

The adoption of the third constitutional amendment, taxing mortgages, submitted to the voters of Missouri for ratification at the last election, has aroused considerable interest and provoked discussion as to its probable effect. In view of the fact that the movement to relieve the mortgagor from an unfair burden of taxation, initiated by the State of California, is spreading throughout the United States, a review of the results so far accomplished would not be inopportune. Before offering any criticism, favorable or otherwise, however, we must have a clear understanding of the exact terms of the amendment itself, which very closely follows the provisions of the California Constitution. It is as follows:

Sec. 1. A mortgage, deed of trust, or other obligation, by which a deed is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, except as to railroad and other *quasi* public corporations, for which provision has already been made by law. In cases of debt so secured the value of the property affected by such mortgage, deed of trust, contract or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof in the county, city or other local subdivision in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property secured and may be paid by either party to such security; if paid by the owner of the security the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security it shall constitute a payment thereon and to the extent of such payment a full discharge thereof.

Sec. 2. Every contract hereafter made by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall as to any interest specified therein and as to such tax or assessment, be null and void.

The evident intent and purpose of this amendment is to prevent double taxation. No more difficult problem of government exists than the effort to subject all property equally to the burdens of taxation, and to avoid the taxation of the same property, directly or indirectly, more than once for the same purpose. Experiment and discussion of this subject, therefore, are not to be discouraged, but whether this particular effort at solution will be successful is not to be too confidently expected.

Let us compare the present with the proposed system. Under the law, as it exists to-day, mortgages and deeds of trust are considered *personal* property, separate and distinct from the security, and are required to be listed for taxation as such by the owners thereof. On the other hand, the owner of the real estate is assessed for the entire

value of the land itself, without any deduction or allowance for the incumbrance existing thereon. It is evident that, under this system, in theory at least, the mortgagor and the mortgagee both pay taxes on the amount represented by the incumbrance. This is double taxation. The intent of the amendment is to consider the mortgage as an interest in the real estate by which it is secured, thereby requiring the mortgagee to make no return on the mortgage as personal property, but to have it assessed against him as part of the real estate, and requiring the mortgagor to pay taxes only on his interest, or equity, in the same property. Apparently the amendment works no hardship on the lender, while it endeavors to do justice to the borrower. But right here we cannot close our eyes to a practical difficulty and to the most lamentable weakness in our present system of taxation, *i. e.*, that the great majority of taxpayers make no return whatever on mortgages, deeds of trust, or other intangible securities. This practice of evasion, seemingly legitimated by the unanimity with which it is practiced, were it not for the strict oath still required to be taken, practically exempts the holders of these securities from taxation. It is argued that this practical exemption permits the lender to lower the rates of interest to a point which would be impossible were he liable to taxation on his securities, and that if he is forced into a position where he can no longer evade taxation, he will raise the rate of interest. Brought face to face with this practical and insurmountable difficulty, the good effects expected to result from the adoption of this amendment are all counteracted, with probably one exception—that the honest lender will no longer be compelled to compromise his conscience, or sacrifice his investments, to meet the competition of his less scrupulous neighbor. It might be suggested in passing that this last result could more satisfactorily be obtained through the remedy adopted by Massachusetts in exempting mortgage securities from taxation altogether, and permitting the mortgagor and mortgagee to make their own agreements as to the payment of taxes on the real estate, thus lowering the rate of interest and freeing the subject from all legal ambiguities and uncertainties.

Some interesting and pertinent questions have been asked relative to the adoption of this amendment which demand an answer: First. When does the amendment take effect? Second. What change is made in the nature of the mortgage, as far as concerns its assessment and sale for taxation? Third. Does the amendment apply to mortgages and contracts executed prior to the adoption of the amendment? Fourth. Would a contract with the mortgagor, entered into after the execution of the mortgage so as not to be a part of the same transaction, or a contract, although contemporaneous with the mortgage transaction, made on the part of the mortgagee, by which he agrees to refund a certain percentage of the interest on presentation of tax receipts, be within the prohibition of the amendment? Many of these questions have been authoritatively answered by the Supreme Court of California, in their construction on a similar amendment to the constitution of California, from which the Missouri amendment has been borrowed almost *verbatim*. It is a well settled principle of law that where the provisions from the constitution of one State are borrowed in framing or amending the constitution of another State, the judicial construction of the former State is presumed to have been adopted with the language.[1]

Although there is some conflict of authority as to the time such amendments take effect, some courts holding that they take effect immediately, on the day of the election,[2] and some making them effective only after the proclamation of the governor,[3] the rule most generally announced and sustained by the weight of authority is that such amendments take effect immediately upon the ascertainment of the result of the vote by the secretary of state from the official returns. This construction, in view of the wording of the Missouri statute, can be relied upon with reasonable assurance as the rule in that State. In Wilson v. State,[4] construing a provision for the amendment of the constitution of Texas, the court said: "Article XVII of the constitution provides: 'If it shall appear from said return that a majority of the votes cast are in favor of any amendment, the said amendment so receiving a majority of the votes cast shall

[1] See Hess v. Pegg, 7 Nev. 23.
[2] 34 Fla. 500.
[3] 78 Md. 152.
[4] 15 Tex. App. 150.

become a part of this constitution, and proclamation shall be made by the governor thereof.' Our construction of this provision is that it is the ascertained majority of the vote of the people, and not the proclamation of the governor, which gives force and effect to the amendment. We are of the opinion, therefore, that as soon as the election returns were canvassed, and it was ascertained that a majority of the votes cast were in favor of the amendment, it became a part of the constitution, and was in full force and effect from that date."

Our second question as to what change is made in the nature of the mortgage, as far as concerns its assessment and sale for taxation, is more easily answered. In *Re* Fair's Estate,[5] the court said: "It may be admitted that mortgage bonds are assessable to the holders of them, or, if their names are not ascertainable, then to the unknown owners; but to whomsoever they are assessed, it is perfectly plain that they must be assessed as an interest in the property incumbered for their payment. They are by express requirement to be deemed and treated for the purposes of taxation as an interest in property. That property being real estate, they can in no event be assessed as mere personal debts or credits. The tax on them is to be collected by the tax collector and not by the assessor." In this case the court enjoined the assessment of certain bonds as personal property, because secured on real estate. In Doland v. Mooney[6] the court held that a mortgage upon real estate is assessable and taxable as an interest in the mortgaged premises; and that when sold for taxes carried with it the land itself and not merely the mortgage with the right of foreclosure. In other words, mortgage securities for the purposes of assessment and sale for taxation are real estate with all the incidents and liabilities peculiar to that kind of property.

The third question—Does the amendment apply to mortgages and contracts executed prior to the adoption of the amendment,—can be answered emphatically in the affirmative as to mortgages and as emphatically in the negative as to contracts other than the mortgage contract. In the case of McCoppin v. McCartney[7] the court held that a mortgage executed prior to the adoption of the new constitution (containing an amendment taxing mortgages) did not have a vested right of exemption from taxation which extended beyond the life of the former constitution, and that the provision of the constitution as to taxation of mortgages executed prior thereto. This rule, however, in no manner interferes with a contract made with the mortgagor by which the latter agreed to pay all the taxes where such contract was made before the adoption of the amendment. An amendment to the constitution can no more violate the obligations of contract than a statute.[8] But the mortgage itself, although entered into prior to the adoption of the amendment, is subject to its provisions. In McCoppin v. McCartney[9] the court, in explaining this distinction, said: "The mortgagee might still enforce his contract against the mortgagor. His relation to the debtor would not be changed, but only his relation to the State. The plain intent of the new constitution is to subject to taxation classes of property previously exempt. That one of the new classes consists of credits secured or unsecured, no more violates any contract or vested right of the creditor, than would a provision by which, for the first time, the owner of any tangible property should be taxed upon its value."

Question number four is an important one. It is in two parts. The first question propounded is as follows: Would a contract with the mortgagor, entered into after the execution of the mortgage so as not to be a part of the same transaction, be within the prohibition of the amendment. It certainly would not. In the case of Bank v. Bardman[10] the Supreme Court of California held that a contract between the mortgagor and mortgagee, whereby the former obligates himself to pay the taxes on the mortgage, is void under the constitution if made contemporaneous with the contract of mortgage, or as part of the same transaction; but that if the agreement were made afterwards, and no part of the mortgage contract, it was good and valid. There can be no doubt as to the correctness of this decision, for the reason that when the mortgagor enters into an agree-

[5] 51 Cent. L. J. 167.
[6] 72 Cal. 34.
[7] 60 Cal. 367.
[8] See Beckman v. Skaggs, 59 Cal. 541.
[9] 60 Cal. 367.
[10] 120 Cal. 220.

ment to pay the taxes after the contract of mortgage is consummated, he cannot be said to have been coerced into making it by the necessities of his situation. The second part of this question strikes at the root of the amendment. Is a contract made on the part of the mortgagee by which the latter agrees to refund a certain percentage of the interest on presentation of tax receipts, within the prohibition of the amendment, although contemporaneous with the mortgage transaction. In answering this question also in the negative, we prove the utter failure of the amendment to fulfill the purposes of its enactment. Such, however, was the decision in the interesting case of Hewitt v. Dean.[11] In that case the court held that a contemporaneous agreement between the mortgagors and mortgagees—that if the mortgagors shall present proper official receipts showing the payment of all taxes against the property covered by the mortgage, they should receive a credit of two and one-half per cent. upon the mortgage note, must be construed by the court; and held further, that, assuming that such agreement includes the mortgage tax, it is not in violation of the constitution, for the reason that the agreement cannot, under any theory, be said to be a "contract" on the part of the mortgagors in any way "obligating" them to pay any tax on the mortgage. In the opinion on this case the court judicially announces the failure of the amendment in California: "The constitutional convention adopted the provision of sec. 5, art. XIII (taxing mortgages) in order that a portion of the taxes might be collected from the mortgagee, and that the burden upon the mortgagor might not at the same time be increased. The provision thus incorporated into the constitution was intended for the benefit of the borrower, but it is unnecessary to say that the results expected therefrom have not been realized. All experience has shown that the rate of interest is governed by the inflexible laws of trade, and is regulated by the same law of supply and demand as that which governs all other articles of commerce, and that legislatures and constitutional conventions are powerless in their attempts to change this law; that whenever the State imposes a tax upon a commodity, the burden of that tax is borne by him whose necessities require him to purchase, and not by him who holds it for sale. It is unnecessary to do more than to state the proposition that whatever burdens in the form of taxation the State imposes upon money which is loaned are in reality borne by the borrower, and not by the lender; that the lender, in fixing the rate of interest, will invariably add the amount of this tax to the market value of the money, and, under the guise of interest, collect from the borrower a sufficient amount to reimburse himself for the amount of the tax."

ALEXANDER H. ROBBINS.

St. Louis, Mo.

[11] 91 Cal. 5.

CONTRIBUTORY NEGLIGENCE — PERIL OF CHILD — RESCUE BY MOTHER.

WEST CHICAGO ST. R. CO. v. LIDERMAN.

Supreme Court of Illinois, Oct. 19, 1900.

The fact that a mother, accompanied on the street by her infant child, while engaged in a conversation with a friend, unconsciously loosens the child's hand, and permits it to stray from her and onto a street car track, where it is exposed to imminent peril from an approaching car, is not, as a matter of law, such negligence in the mother contributing to place the child in a perilous position as will preclude her recovery for injuries sustained in a reasonably prudent effort to save the child's life, and necessitate a reversal of the jury's finding that she was not guilty of contributory negligence.

WILKIN, J.: Appellee recovered a judgment against appellant in the superior court of Cook county in an action on the case for personal injuries, which has been affirmed by the branch appellate court for the first district. The declaration charged both negligence and willful misconduct by the employees of the defendant, causing the injury sued for. It was not, however, claimed upon the trial, nor is it now, that the act was wanton or willful. The first additional count states the cause of action sued for, as follows: That while the plaintiff, with due care, was going upon a street and the track of the defendant to rescue her infant child from being run over and injured by an approaching train of defendant's cars, defendant negligently operated said train, so that the grip car ran against plaintiff, throwing her to the ground and injuring her. The accident occurred on July 19, 1897. Plaintiff then lived at 447 Halstead street, on which the defendant operated a line of cable cars. On that afternoon she went to a grocery store on the opposite side of the street, a short distance north of her residence, taking with her a child about three years of age. As she came out of the store she stopped on the sidewalk to speak to a friend whom she met there. She at first held the child by the hand, but during the conversation uncon-

sciously let go of it, and a moment later, as she testified, saw it upon the street car track, and a car approaching at the usual rate of speed, some eighty or ninety feet away. She instantly ran towards the child, throwing up her hands, and crying out to stop the car. Another person saw the danger to the child, and called to the gripman in charge of the car to stop. The evidence is conflicting as to whether he was guilty of negligence in failing to stop the car before the collision, and also whether the child was upon the track, or in actual danger, at the time plaintiff ran in front of the car. It is admitted, however, that these and all other controverted questions of fact, except due care on the part of the plaintiff, have been settled adversely to defendant below. On this branch of the case it is earnestly contended that the evidence neither proved nor tended to prove that fact, and therefore the trial court erred in refusing instructions asked by the defendant to take the case from the jury, and this is the only point of controversy in this court.

The question, then, for decision upon this record must be, did the evidence produced upon the trial, with all its reasonable intendments, justify the jury in concluding that the plaintiff was, under all the circumstances, in the exercise of reasonable care for her own safety at the time she received the injury sued for? It may—we think must—be conceded that, leaving out of view the peril of her infant child, she was guilty of such contributory negligence as would defeat the action. Counsel for appellant admit that the general rule is that a person has a right to risk his own life or limb in an effort to save the life of another person, and cannot be charged with contributory negligence in so doing. In Eckert v. Railroad Co., 43 N. Y. 502, 3 Am. Rep. 721, the action was for negligently causing the death of the plaintiff's intestate, who was killed while attempting to rescue a child on the track of the defendant company under circumstances not unlike those surrounding the parties in this case. After stating that the conduct of the deceased would have been grossly negligent but for the effort to save the child, it is said: "But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury is negligence which will preclude a recovery for an injury so received; but when the exposure is for the purpose of saving life it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding deceased free from negligence, under the rule as above stated." This is a clear statement of the law and the reason upon which the rule rests, and is abundantly sustained by the authorities. Whether, in this case, the plaintiff acted with reasonable prudence, or with recklessness, in attempting to save her child, was a question for the jury under all the facts and circumstances in evidence.

There is, however, an exception to the general rule above stated, which is that, if the person attempted to be rescued was placed in the position of danger through the fault of the person injured, the danger will not excuse the attempt to save him, and counsel for appellant insist that this case falls within that exception. Reliance in support of this position is especially placed upon the case of Railway Co. v. Leach, 91 Ga. 419, 17 S. E. Rep. 619. In that case the injured party had wrongfully taken a child upon a trestlework of a railroad, and was killed while attempting to save it from injury by an approaching train. The court there said: "In making the efforts, however, he was neglecting his own safety, and thus violating his duty to the company. He had the choice of two fearful alternatives, and he undertook—and it was creditable to him—to perform the duty he owed the child, but it must not be overlooked that he was himself responsible for the situation that forced this awful alternative upon him." There, it will be seen, there was upon the part of the deceased something more than mere passing negligence,—mere omission of duty,—but an affirmative act in taking the child into a place of imminent danger. Here the most that can be said is that the mother was negligent in failing to give proper attention to the child. It is undoubtedly the duty of parents in cities to use reasonable care to guard their children against the known danger to them when allowed to go unattended upon the public streets; but the standard of such care is not capable of being defined by the law, and each case must depend upon its own facts and circumstances. That it is not negligence *per se* to permit infants to be upon

the streets of a city was held by this court in City of Chicago v. Major, 18 Ill. 349. In Fox v. Railway Co., 118 Cal. 55, 50 Pac. Rep. 25, 62 Am. St. Rep. 216, the action was against the street-railway company for negligently running over and killing a child 4½ years of age. The child had been permitted to play in the street in front of the family residence in the city of Oakland, and occassionally went upon the street on which it was killed, about 100 feet away from the dwelling, though it had been cautioned by its mother not to do so. It had been absent from home some 15 minutes at the time of the accident. The evidence was to the effect that it was an ordinarily obedient child; that his parents were laboring people, and had only one other child, a 13 year-old daughter who was attending school. To the contention on behalf of defendant below that the evidence established negligence *per se* the court say: "If the term 'negligence' signified an absolute quantity or thing, to be measured in all cases in accordance with some precise standard, much of the difficulty which besets courts in the solution of this class of cases would be at once dissipated. But, unfortunately, it does not. Negligence is not absolute, but is a thing which is always relative to the particular circumstances of which it is sought to be predicated. For this reason it is very rare that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. As a very general rule, it is a question of fact for the jury,—an inference to be deduced from the circumstances; and it is only where the deduction to be drawn is inevitably that of negligence that the court is authorized to withdraw the question from the jury. The fact that the evidence may be without conflict is not controlling, nor even necessarily material. Conceded facts may as readily afford a difference of opinion as to the inferences and conclusions to be drawn therefrom as those which rest upon conflicting evidence, and, if there be room for such difference, the question must be left to the jury. Beach, Contrib. Neg. § 163; Schierhold v. Railroad Co., 40 Cal. 447; Van Praag v. Gale, 107 Cal. 438, 40 Pac. Rep. 555. Within these principles the evidence of this case cannot be said to establish negligence *per se*. Parents are chargeable with the exercise of ordinary care in the protection of their minor children; and whether the conduct of the mother, for which plaintiff is to be held responsible, in permitting the deceased child to be out of her sight for a period of from fifteen to twenty minutes without satisfying herself of its whereabouts was, under all the circumstances, a want of ordinary care, was, we think, a fairly debatable question.' Schierhold v. Railroad Co., *supra;* Meeks v. Railroad Co., 56 Cal. 513; Birkett v. Ice Co., 110 N. Y. 504, 18 N. E. Rep. 108; Slattery v. O'Connell, 153 Mass. 94, 26 N. E. Rep. 430, 10 L. R. A. 953; and Creed v. Kendall. 156 Mass. 291, 31 N. E. Rep. 6, are to the same effect.

It is said that in the Massachusetts cases, *supra*, facts were shown such as pecuniary circumstances, condition of health, etc., of the parents, whereas here nothing of the kind appears. It is true that in the Major case, *supra*, and perhaps the decisions of other courts on the question of parental care in keeping their children off the streets of cities, allusion is made to the fact that the parents of many children in large cities are laboring people, and in limited circumstances, unable to employ nurses and servants to attend their children. Such facts do not, however, determine the right of the parent to suffer children to go upon the street, but the question decided in such cases is that it is not negligence *per se* for them to do so. It certainly cannot be said, as a matter of law, that it is negligence *per se* for a wealthy or healthy parent to permit his infant child to be upon a public street where he knows it is exposed to danger, but that it is not such negligence if the parent be sick or poor, depending upon his daily labor for support of himself and family; and the weight of authority, we think, is clearly against any such any discrimination. Fox v. Railway Co., *supra*, and cases there cited. If, in this case, the plaintiff had simply permitted her child to be upon this street unattended, and it had been injured or killed through the negligence of the defendant company, and she had brought an action for that injury, it is clear that under the authorities the question whether she was guilty of such contributory negligence as would defeat her action would have been a question for the jury. Can it be said, as a matter of law, that she exercised a less degree of care in this case? It is true that nothing was shown tending to prove her inability to keep constant watch over her child, or to employ others to do so; but did she so far fail to exercise reasonable care in restraining it from being exposed to danger that a court can say, as a matter of law, that she was guilty of contributory negligence? As before stated, her own evidence shows that she held the child by the hand, and that it slipped away from her only for a moment, and that she immediately pursued it. Can the court say, as a matter of law, that she was bound to hold the child in her arms, or hold it by the hand, or keep her eyes on it constantly while upon the street?

When facts are unchallenged, and are such that reasonable minds could draw no other inference or conclusion from them than that the plaintiff was or was not at fault, then it is the province of the court to determine the question of contributory negligence as one of law, and when the case is all against the plaintiff there may properly be a nonsuit; but, in the language of Mr. Field, 'to justify a nonsuit on the ground of contributory negligence, the evidence against the plaintiff should be so clear as to leave no room for doubt, and all material facts must be conceded or established beyond controversy." Beach, Contrib. Neg. §§ 447–449; Railroad Co. v. O'Conner, 119 Ill. 586, 9 N. E. Rep. 263; Hoehn v. Railway Co., 152 Ill. 223, 38 N. E. Rep. 54

Railway Co. v. Brown, 152 Ill. 484, 39 N. E. Rep. 273; Railroad Co. v. Placek, 171 Ill. 9, 49 N. E. Rep. 191. It seems to us clear beyond controversy that all reasonable persons would not say, under the facts showing the conduct of this mother prior to the time that her child got upon the street-car track, that she was guilty of negligence; that very many would consider her reasonably careful. The question was, therefore, one of fact, and proper to be submitted to a jury. She had a right reasonably to presume that if the child for the time escaped from her, and became exposed to danger, others would not negligently injure it; and, seeing it suddenly so exposed, she had the right, and it was her duty, not only to the child, but to the defendant itself, to make all reasonable efforts to rescue it from that danger. On the whole record we find no reversible error, and the judgment of the appellate court will be affirmed. Judgment affirmed.

NOTE.—*Question of Contributory Negligence in Attempting to Rescue the Life of Another.*—Questions of contributory negligence are among the most perplexing that courts of last resort are called upon to answer, not because of any inherent difficulty in the subject itself, but rather because its exact definition and limitation is practically impossible. As a general rule, therefore, questions of contributory negligence are left to the jury to be determined as matters of fact rather than as questions of law. Certain definite principles, however, have been laid down by the courts to guide juries in reaching a just determination of such questions. Of these principles none express a more conservative public policy than the one so ably laid down in the principal case, *i. e.*, that no charge of contributory negligence can be imputed to one who throws himself into danger to rescue the life of another, provided his action would not constitute rashness in the judgment of prudent persons. This rule is well sustained by the following authorities: Eckert v. Railroad Co., 43 N. Y. 502; Spooner v. Railroad Co., 115 N. Y. 22; Walters v. Electric Light Co., 12 Colo. App. (1898) 145; Hirschman v. Dry Dock, 61 N. Y. Supp. 304; Condiff v. Railroad Co., 45 Kan. 256; Gibney v. State, 137 N. Y. 1; L. & N. R. R. v. Orr, 121 Ala. (1899) 489; Peyton v. Railroad Co., 41 La. Ann. 861; Railroad Co. v. Hanlon, 53 Ala. 70; Linnehan v. Sampson, 126 Mass. 506. These, we believe, to be all the important American authorities on this point up to this time. The case of Eckert v. Railroad, *supra*, the principal case in support of this proposition, is accurately stated and quoted by Justice Wilkin in the leading case. In the case of Gibney v. State, *supra*, a father sought to rescue his son from drowning where the latter had fallen through an opening in a bridge which had been left unguarded. Both were drowned. In an action for damages for the death of the father the court held the latter free from any charge of contributory negligence. In the case of Condiff v. Railroad Co., *supra*, it was held that an exposure of life of an employee to save the life of a fellow employee is neither wrongful nor negligence unless made under circumstances constituting rashness in the judgment of prudent persons. So also it is not contributory negligence on the part of an engineer who when a collision is threatened remains at his post in the hope of saving others upon the train. Cotteril v. Railroad Co., 47 Wis. 634; Pennsylvania Co. v. Roney, 89 Ind. 453. In Walters v. Electric Light Co., *supra*, a mother voluntarily rushing to the rescue of her child whom she discovered in contact with a live electric wire, caught the child by the hand to drag him away and was herself injured. The court, after holding that it made no difference whether the mother had knowledge or not that her action would result in her injury, uses these strong words: "The instincts of a mother when she sees her child in distress will lead her to rush headlong to its rescue without stopping to count the cost or measure the risk which she is incurring; and to say that an act to which her affection irresistibly impelled her should be charged against her as something imprudent and unnecessary would be to shock a sentiment which is as universal as mankind. The law is not the creature of cold blooded, merciless logic and its inherent justice and humanity will never for a moment permit the act of a mother in saving her offspring, no matter how desperate it may have been, to be imputed to her as negligence." In the case of L. & N. R. R. v. Orr, *supra*, the court held that a replication to a plea of contributory negligence, stating that the deceased was killed while trying to save the life of a child, might be insufficient unless it also states facts showing that an attempt was not rash nor reckless. The court suggests an admirable statement of the rule which in its language is so peculiarly accurate as to make it well adapted to the proper framing of instructions: "Where one risks his life and loses it in an effort to save the life of another or to protect another who is exposed to a sudden peril, such risk and exposure for such purpose is not negligence unless the effort is made under such circumstances as to constitute recklessness and rashness in the judgment of a man of ordinary prudence; and it cannot be said to be a rash or a reckless act on the part of the rescuer if the appearance justifies a belief that he could effect a rescue even though he should have reason to believe and in fact did believe that he might fail and receive grievous injuries himself." In this connection we desire to call attention to the statement of the court in the principal case that there is an exception to the rule just stated to the effect that if the person attempted to be rescued was placed in the position of danger through the fault of the person injured, the danger will not excuse the attempt to save him. This exception at first glance seems eminently just, but we respectfully insist that there is no authority whatever for it, unless it be the case of Railroad Co. v. Leach, 91 Ga. 419, and it is flatly contradicted by the decision of the court in the case of Donahoe v. Railroad Co., 83 Mo. 560. In the latter case the court held that where a mother is injured while attempting to rescue her infant child from the danger of an approaching train the railroad is liable if it was guilty of negligence with respect to the child before the mother attempted the rescue or with respect to the mother or child after the attempt to save the child began, and this is the case, although the parent of the child may have been guilty of contributory negligence in permitting it to go on the track. Further the court said: "It is to be observed that it is only when the railroad company by its own negligence created the danger or through its negligence is about to strike a person in danger, that a third person can voluntarily expose himself to peril in an effort to rescue such person, and recover for an injury he may sustain in that attempt. If the railroad company is not chargeable with negligence with respect to the person in danger the case of a person who at-

tempted to rescue him and was injured must be determined with reference to the negligence of the company in its conduct toward him and his in making the attempt. In other words, the negligence of the company, as to the person in danger, is imputed to the company with respect to him who attempts the rescue, and if not guilty of negligence as to such person then it is only liable for negligence occurring with regard to the rescuer after his efforts to rescue the person in danger commenced." In this case the court held the railroad free from negligence. Such also was the decision of the court in Evansville v. Hiatt, 17 Ind. 102, and according to Shearman & Redfield on Negligence, on last edition, sec. 85, such was the only basis for the decision in the case of Railroad Co. v. Leach, *supra*. Suppose, as in this last case, a father takes his child upon the trestle of a railroad by reason of which act the child is placed in peril of its life, and seeing the child's danger, a stranger rushes to the rescue and is injured. There can certainly be no doubt that if the railroad company is chargeable with any negligence in respect to the child or rescuer the latter can recover, for the reason that in no case can the negligence of the father be imputed to the child, and the latter is therefore wholly without fault. Can it be said that the father would not have the same right? We apprehend the true rule to be that if the railroad company is chargeable with any negligence in regard to the person in danger, the party attempting to rescue such person is under no circumstances guilty of contributory negligence provided his action in making the attempt would not be considered rash or reckless in the judgment of prudent persons.

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 74.

Among the many valuable cases reported in this volume is Malatt v. Shriver (Md.), wherein is discussed and which is followed by a long note on the subject of When, after the Appointment of a Receiver, and without Obtaining Leave of the Court, Actions may be Prosecuted against Him or against the Person for Whom such Receiver is Appointed. The case of Van Dusen-Harrington Co. v. Jungeblut (Minn.), has a note on the subject of Rights and Remedies of Brokers and their Clients when Purchases are on Margins. The Law of Self-Defense is well discussed in the note to case of State v. Sumner (S. Car.).

THE QUILL DRIVER.

Vivacious, sprightly, entertaining, just the thing for the busy lawyer; it will enable him after a hard days' work to while away an hour or two in pleasant recreating reading. The frontispiece alone will dispel the blues from the mind of the discouraged lawyer. It slings good English. It modestly asserts that it's the best magazine "out o'Gotham," and a long ways out of Gotham it is. Published at Benton, Arkansas. On referring to our gazetteer we find that Benton is located in Saline county, Arkansas, and by the census of 1890, had a population of 1,000. We have not at hand its United States count for 1900. Its prospectus is as follows: Permanent Planks in the Pen Pushing Platform of the Quill Driver. It is published to promulgate pertinent thought on penetrating topics. It is emphatically and enthusiastically sent to cash subscribers only. It desires to do business with high class advertisers, and hence, will constantly and consistently decline to exploit the pseudo proficiency of pennyroyal pills, manhood restorers, bust developers, and all species of cheap, catch-penny compounds. Contributions paid for when containing merit, originality, common sense and conciseness. It will always maintain decency in debate, decorum in discussion, and dignity in diatribe, but will discuss anything or anybody, at any time or anywhere, in any manner or any style it may elect. It is as yet uninformed on some stray subjects from ants to zebras, and therefore courts correction, chastisement and conviction. It is neither the peon of a party nor the puppet of a prince—pauperism, poverty and penury to the contrary notwithstanding. It proposes to merit patronage persistently, pertinaciously and pruriently. It does not presume to pretend to predict its policies prior to other people's platforms. It will not waste its hoof prints on the wayside sapling. It is published monthly. The issue before us is poorly executed mechanically, but well executed mentally. Its review or rather analysis of Warren's Ten Thousand a Year, is a masterpiece of careful scrutiny and correct judgment, and a whole lot of squibs and fun.

BOOKS RECEIVED.

The Law and Practice in Bankruptcy, under the National Bankruptcy Act of 1898, with Citations to the Decisions to Date. By William Miller Collier. Third Edition, Revised and Enlarged. By James W. Eaton, of the Albany, N. Y., Bar, Instructor in the Law of Contracts and Evidence, Lecturer on Bankruptcy in the Albany Law School, and Editor of the American Bankruptcy Reports. Albany, N. Y. Matthew Bender, 1900. Sheep, pp. 910. Price, $6.30. Review will follow.

HUMORS OF THE LAW.

A gentleman who had a suit in chancery was called upon by his counsel to put in his answer, for fear of incurring a contempt. "Well," says the client, "why is not my answer put in then?" "How should I draw your answer," saith the lawyer, "without knowing what you can swear?" "Hang your scruples," says the client again; "pray do your part of a lawyer, and draw me a sufficient answer; and let me alone to do the part of a gentleman, and swear it."

An eminent judge of the C. P. Four Courts, having been called on at a public dinner for a song, regretted that it was not in his power to gratify the company. A wag who was present, observed that he was much surprised by the refusal of the learned judge, as it was notorious that a great number of persons had been "transported by his voice."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Important Decisions and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. APPEAL—Affidavit — Authentication.—An affidavit on appeal from a judgment in justice court, purporting to have been made before a notary public, was not authenticated by his notarial seal. Held, that the affidavit was incomplete and inoperative, and could not be amended by affixing the official seal after the time for appealing had expired.—GRIMES V. FALL, Minn., 83 N. W. Rep. 835.

2. ASSIGNMENTS FOR CREDITORS—Employees' Liens.—Where the statute giving to the employees of a manufacturing establishment assigned for the benefit of creditors a lien on the property embarked in the business, for the amount due them, was amended after plaintiff was employed by such an establishment, but before the establishment made an assignment for the benefit of creditors, plaintiff's rights are to be determined by the statute as amended, as no lien attached until the assignment was made.—WINTER V. HOWELL'S ASSIGNEE, Ky., 58 S. W. Rep. 591.

3. ATTACHMENT—Wrongful Levy—Damages.—An action to set aside a conveyance alleged to have been executed in fraud of creditors creates a *lis pendens* lien on the property sought to be thus subjected, and, as the levy of an attachment in such suit on the property causes no additional damage, the defendant, on defeating the attachment, cannot recover damages for the wrongful levy thereof; the only damage suffered being caused by the bringing of the action.—CALDWELL V. DEPOSIT BANK OF EMINENCE, Ky., 58 S. W. Rep. 589.

4. ATTORNEY AND CLIENT — Attorney's Fees—Lien.—Where an attorney defended a homestead from sale under attachment, and, in order to assert the right of homestead, procured the rescission of a fraudulent conveyance which the defendant had made of it, he was entitled to an attorney's lien thereon, since the property was not only protected in the suit, but was actually recovered.—MCLEAN V. LERCH, Tenn., 58 S. W. Rep. 640.

5. BANKRUPTCY—Avoiding Judgments — Fraudulent Conveyance.—Construed in connection with the other parts of the bankruptcy act of 1898, the word "judgments," in section 67f, providing that all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent, within four months prior to the filing of petition in bankruptcy, shall be void, if he is adjudged a bankrupt, means "judgment liens," so that the equitable lien arising from a creditors' bill to set aside a fraudulent conveyance, having its date from the filing of the bill, and not from the date of the decree in the suit, is not avoided by the bankruptcy proceedings, where the bill is filed more than four months prior to the petition in bankruptcy, though the decree is rendered within such four months.—DOYLE V. HEATH, R. I., 47 Atl. Rep. 213.

6. BANKRUPTCY — Concealment of Property—Insurance Policies.—A bankrupt, who was a man of advanced years, had life insurance policies maturing in five years, and, in case of his death, payable to his daughters. Their surrender value was about $500, and they were pledged as security for a note of $500. Held, that the failure of the bankrupt to include such policies in his schedules was insufficient to establish a charge of fraudulent concealment which would prevent his discharge.—IN RE ADAMS, U. S. D. C., N. D. (N. Y.), 104 Fed. Rep. 73.

7. BANKRUPTCY — Corporations—Nature of Business.—To sustain proceedings in involuntary bankruptcy against a corporation, under Bankr. Act 1898, § 4b, it must be both alleged and proved not only that the corporation is authorized by its charter to carry on one of the kinds of business enumerated in the act, but that it is in fact "engaged principally" in such business.—IN RE CHICAGO-JOPLIN LEAD & ZINC CO., U. S. D. C., W. D. (Mo.), 104 Fed. Rep. 67.

8. BANKRUPTCY—Proof of Claim by Guarantor—Effect of Preference.—Under Bankr. Act 1898, § 57*l*, which entitles one whose individual undertaking secures the debt of a bankrupt, on the discharge of such undertaking, to be subrogated to the rights of the creditor against the estate of the bankrupt, his rights are measured by those of the creditor; and, where the latter cannot prove his claim without first surrendering a preference under section 57*f*, a guarantor who has paid the remainder of the debt since the adjudication is subject to the same condition, and can prove up the claim only on returning to the estate the amount of such preference.—IN RE SCHMECHEL CLOAK & SUIT CO., U. S. D. C., W. D. (Mo.), 104 Fed. Rep. 64.

9. BANKRUPTCY — Unliquidated Claims—What are Provable.—Bankr. Act 1898, § 63, subsec. "b," which provides for the liquidation by the court of unliquidated claims against the bankrupt, and that they may thereafter be proved against his estate, covers only such claims as, when liquidated, are provable debts under the specifications of the preceding subsection "a," and does not authorize the liquidation and proof of claims arising *ex delicto*, unless they are of such a nature that the claimant might, at his election, waive the tort, and recover in *quasi* contract.—IN RE HIRSCHMAN, U. S. D. C., D. (Utah), 104 Fed. Rep. 69.

10. BILLS AND NOTES—Alteration—Pleading.—A reply merely denying the allegation of the answer that a negotiable note sued on had been materially altered did not raise the issue that the note was so negligently drawn that the alteration could be made without exciting the suspicion of an ordinarily prudent business man, and therefore plaintiff could not rely on that fact to avoid the defense.—BANK OF COMMERCE V. HALDERMAN, Ky., 58 S. W. Rep. 587.

11. BONDS—Form of Action.—Where money is paid in consideration of the giving of a bond conditioned to support the plaintiff, the money paid cannot be recovered on a count for money had and received, based on a failure of consideration by the breach of the bond, but the action must be based on the bond.—FIELD V. BANKS, Mass., 58 N. E. Rep. 155.

12. BROKERS — Exchange of Land—Commission.—Where an owner employed a broker to exchange property for "any other suitable property," and such broker produced a party with whom the owner contracted to exchange for property which he accepted as "suitable," but such exchange was never made because of a defect in the customer's title, the broker is entitled to his commission, provided he was ignorant of the defect in the title.—ROCHE V. SMITH, Mass., 58 N. E. Rep. 152.

13. BROKERS—Real Estate—Commissions for Selling.—When property has been listed for sale with different real estate agents, the agent who induces the seller and purchaser to enter into the contract is entitled to

the commission, though another agent may have first brought the parties together.—HIGGINS v. MILLER, Ky., 58 S. W. Rep. 580.

14. BUILDING AND LOAN ASSOCIATIONS—Rights of Borrower.—A borrowing member of a building and loan association cannot be charged with an arbitrary amount fixed by the by-laws for expenses, but the association must tender a statement of the account for expenses to entitle it to charge the borrower with anything on that account.—UNITED STATES BLDG. & LOAN ASSN. v. CASSIDY, Ky., 58 S. W. Rep. 606.

15. CARRIERS OF PASSENGERS—Street Railways—Negligence.—Where plaintiff, who alighted from a car of defendant company at an intersection of its lines, was injured, as he passed around behind the car from which he alighted, by a car on the other track, an instruction that plaintiff should still be considered a passenger at the time of the accident, and that the defendant was under a high degree of care to protect him, was erroneous, since the relation of passenger ceased the moment he descended to the street.—CHATTANOOGA ELEC. RY. CO. v. BODDY, Tenn., 58 S. W. Rep. 646.

16. CHATTEL MORTGAGE—Landlord's Lien—Priority.—Code, § 1064, provides that the mortgage of an unplanted crop made on or after January 1st of the year in which they are to be grown conveys the legal title thereto as though already planted. Plaintiff in detinue claimed certain crops under an unpaid mortgage thereof made January 4th by defendants, then owners of the land on which they were to be raised, and recorded January 7th. On March 28th defendants deeded such lands to intervener, who thereupon rented it to defendants, taking their note for the rent. Held, that intervener's landlord's lien on the crops for rent was junior to plaintiff's mortgage, since he bought the land subject to the mortgage, and with constructive notice thereof.—SHOWS v. BRANTLEY, Ala., 28 South. Rep. 716.

17. CHATTEL MORTGAGES—Mortgage on Shares of Stock.—One to whom shares of stock are pledged to secure an antecedent debt is not a *bona fide* purchaser for value, and therefore holds them subject to any lien which was valid against the pledgor, though he had neither actual nor constructive notice thereof.—SPUSTER v. JONES, Ky., 58 S. W. Rep. 595.

18. CONTRACTS — Evidence.—Where defendant required by contract to deliver notes to plaintiff, is ordered by the latter to deliver them to an agent, and does so, but the notes are returned for the insertion of a provision for interest, and are destroyed, and new notes made, which are delivered to the agent, after the complainant has ordered the defendant not to deliver them to him, the question whether the delivery of the first notes was a performance of the contract, which would authorize the defendant to give the second notes to the agent, is for the jury.—STOKES v. POLLEY, N. Y., 58 N. E. Rep. 133.

19. CONTRACT — Provisions — Premature Action. — Where a contract stipulates that payments for certain work should "be based on the engineer's returns," and were to be made "monthly," an action brought between the time of receiving the engineer's return and the end of the month is not prematurely brought.—HOMER v. SHAW, Mass., 58 N. E. Rep. 160.

20. CONTRACTS — Specific Performance — Agency. — Where, in a suit for specific performance of a contract to convey interests in mining property, the defendants owning the property answered that before making the contract they had contracted for the sale of the same property with certain co-defendants, and the co-defendants filed a cross bill for performance of their contract, and defendants' answer to the cross bill, as well as their answer to an amended cross bill, admitted that the contract was executed by them, and it appeared that after the latter contract was executed the co-defendants took possession of the property thereunder, and on the trial no question as to the authority of those executing the contract to make the same was raised, there was sufficient evidence of authority on their part to bind the defendants, to entitle the co-defendants to a decree for specific performance.—BURRIS v. ANDERSON, Colo., 62 Pac. Rep. 362.

21. CONTRACTS—Validity—Public Policy.—A covenant in a deed for the exchange of hotel properties, by which the grantee in one deed agrees that for a period named he will not use the property acquired by him for hotel purposes, is not void, as being contrary to public policy.—WITTENBERG v. MOLLYNEAUX, Neb., 83 N. W. Rep. 842.

22. CORPORATIONS—Incorporation—Corporate Existence.—A corporation has no *de jure* existence until the secretary of state has issued the certificate required by Civ. Code, § 296, providing that on the filing of a certified copy of the articles of incorporation, filed in the county clerk's office, with the secretary of state, he must issue to the corporation a certificate that the copy of its articles, containing the required statement of facts, has been filed in his office; and, "thereupon," the persons signing the articles, and their associates and successors, shall be a body corporate.—WALL v. MINES, Cal., 62 Pac. Rep. 886.

23. CORPORATIONS—Officers — Individual Debt. — Defendant, as the representative of a foreign insurance company, delivered certain fire policies, issued to A, on property in New Mexico, to B, who had been receiving and paying the premiums of similar policies issued to A. Afterwards B, who was the treasurer of plaintiff corporation, gave a check, signed by himself as treasurer of the company, in payment of the premiums, without authority from the company. The defendant did not know who was interested in the insured property, and, though near the office of the plaintiff, made no inquiry as to the right of A to pay the premium with the money of the corporation. Held, that the corporation could recover the money of the defendant, as the facts were sufficient to put it on inquiry as to the treasurer's authority.—ROCHESTER & C. TURNPIKE ROAD CO. v. PAVIOUR, N. Y., 58 N. E. Rep. 114.

24. CORPORATIONS — Receivers — Appointment.—The fact that a corporation was dissolved by the expiration of its charter, and that its assets had passed into the hands of the board of directors as provided by statute, presented no ground for the appointment of a receiver.—ANDERSON v. BUCKLEY, Ala., 28 South. Rep. 730.

25. COURTS—Conflicting Jurisdiction — Estoppel. — Where a party to an action fails to object to the jurisdiction of the court, but acquiesces in the decree for a number of years, and enjoys the benefits thereof, he is estopped from subsequently attacking the decree collaterally.—CONSOLIDATED HOME SUPPLY DITCH & RESERVOIR CO. v. NEW LOVE LAND & GREELEY IRRIGATION & LAND CO., Colo., 62 Pac. Rep. 364.

26. COURTS—Jurisdiction — Foreign Judgment—Corporations—Service.—Where process was served in Alabama on a former agent of a defendant insurance company, which was organized under the laws of, and had its office and principal place of business in California, and had ceased to do business in Alabama before the action was brought, the courts of Alabama did not obtain jurisdiction of the defendant's person, and hence a judgment by default in Alabama would not sustain a suit against it in the California courts.—EUREKA MERCANTILE CO. v. CALIFORNIA INS. CO., Cal., 62 Pac. Rep. 393.

27. CRIMINAL LAW—False Pretenses—Definition.—The question of whether false pretenses set out in an indictment as the basis of prosecution are adapted to deceive is for the jury, unless they are in their nature so absurd and incredible that a conviction would not be sustained; and the test of the sufficiency of the false pretenses is not whether they would deceive a person of ordinary caution and prudence, but whether they did in fact deceive the person alleged to have been defrauded.—STATE v. STEWART, N. Dak., 83 N. W. Rep. 869.

28. CRIMINAL LAW — Forgery — Character of Instrument.—A written instrument, which shows upon its face that it neither creates nor purports to create any liability on the part of anyone, is not the subject of forgery, unless extrinsic facts exist which give to it that character.—STATE v. RYAN, N. Dak., 83 N. W. Rep. 865.

29. CRIMINAL LAW — Rape — Assault. — Where, in a prosecution for assault with intent to rape, a statement by accused that he only desisted from the assault because he feared prosecutrix's husband would come, having been admitted in evidence as a voluntary confession, its admission would not be reviewed on appeal, there being no evidence showing that it was involuntary.—STATE v. PAGE, N. Car., 37 S. E. Rep. 66.

30. CRIMINAL LAW—Rape—Evidence.—In a prosecution for rape it was proper to refuse to allow questions to be put to prosecutrix on cross-examination to show that she had led an unchaste life, for the purpose of contradicting her testimony that she had been chaste, and showing whether she had testified truthfully that defendant had forcibly accomplished his purpose.—PEOPLE v. BENO, Cal., 62 Pac. Rep. 404.

31. CRIMINAL LAW — Robbery — Indictment. — An indictment charging robbery from the person of one who was not the owner of the property taken was good, though it did not aver that he was lawfully in possession, or that he was the legal custodian, the presumption being that his possession was rightful.—DANZEY v. STATE, Ala., 28 South. Rep. 697.

32. DEDICATION OF STREET—Evidence—Plat.—A dedication of land for public use can only be made by the owner, and a plat is admissible to prove such dedication only where it is shown to have been made by the owner, or under his authority.—JOHNSON v. COMMON COUNCIL OF DADEVILLE, Ala., 28 South. Rep. 700.

33. DEED—Mortgages.—Where the owners of land gave a deed thereof to one who had made advances to them, and the premises were redeeded,—notes being given for the amount of the advances, and a vendor's lien reserved,—the transaction amounted to a mortgage.—BUTLER v. CARTER, Tex., 58 S. W. Rep. 622.

34. DEED—Reformation.—An instrument intended to operate as a conveyance of land is reformable in character, and where, in its drafting by a notary public, words are used which give to it the character of a testamentary instrument, passing no present estate, when the intention of the parties was to reserve to the grantor only a life estate in the premises conveyed, such mistake may be corrected in a court of equity to conform to the true intention of the parties to such instrument.—PINKHAM v. PINKHAM, Neb., 83 N. W. Rep. 937.

35. EJECTMENT—Equitable Defenses.—In this State the defendant in ejectment is allowed to set up an equitable defense, and ordinarily evidence of all facts and circumstances tending to prove an equitable title in the defendant superior to the title asserted by the plaintiff is admissible.—FRAZIER v. JEAKINS, Kan., 62 Pac. Rep. 354.

36. ELECTIONS—Secretary of State — Certification of Candidates.—Under the statutes of this State, requiring the secretary of state to certify to the proper county officer the names of all persons whose nominations for office have been filed with him, such secretary has no judicial power to inquire into the regularity or legality of such nominations.—STATE v. FALLEY, N. Dak., 83 N. W. Rep. 860.

37. EMINENT DOMAIN—Taking for Public Purposes. —Where the United States Government, in the proper exercise of its powers, has undertaken the improvement of the navigation of a river, and by means of the dams and other works therein built has caused a permanent rise in the level of the water of such river, resulting in the flooding of rice land adjacent, which was previously protected by embankments, and drained into the river, so as to render it permanently valueless for any purpose, such action constitutes a taking of the land for public purposes, within the meaning of the fifth amendment to the constitution, and the owner is entitled to recover just compensation therefor.—WILLIAMS v. UNITED STATES, U. S. C. C., D. (S. Car.), 104 Fed. Rep. 50.

38. EXECUTION — Exemption — Personal Earnings.—Under Code 1897, § 4011, providing that the earnings of a debtor who is the head of a family for his personal services for 90 days preceding a levy shall not be liable for his debts, the fact that such head of a family has to bring an action to recover his wages, and is unable to recover judgment therein, or reduce such wages to possession, till more than 90 days after such wages were earned have expired, does not render such wages exempt from liability for his debts when recovered.—CHADWICK v. STOUT, Iowa, 83 N. W. Rep. 900.

39. FEDERAL COURTS—Circuit Courts of Appeals — Jurisdiction.—Where the controlling question in a case involves the construction and application of the constitution of the United States, the circuit court of appeals should decline to take jurisdiction, although the question was not raised by the plaintiff's pleading, and the jurisdiction of the circuit court was not dependent upon it.—AMERICAN SUGAR REFINING CO. v. CITY OF NEW ORLEANS, U. S. C. C. of App., Fifth Circuit, 104 Fed. Rep. 2.

40. FEDERAL COURTS—District in Which Suit Must be Brought.—A corporation of New York having its office in Buffalo, which does not maintain, and has never maintained, any office or place of business in the State of Ohio, is not "found" in that district, within the meaning of the federal statutes, so as to be subject to suit there, merely because one of its officers is temporarily in Ohio, superintending work being done by the corporation in a harbor, under a contract with the United States; and service of process upon such officer confers no jurisdiction on the courts of the State or district over the corporation.—EIRICH v. DONNELLY CONTRACTING CO., U. S. C. C., N. D. (Ohio) 104 Fed. Rep. 1.

41. FORCIBLE ENTRY AND DETAINER.—One who enters upon land in the actual possession of another, without his consent, may be removed by a writ of forcible entry and detainer, though the right of entry was in him, and an action instituted by him involving the title and right of possession be pending.—YOUNG v. YOUNG, Ky., 58 S. W. Rep. 593.

42. FRAUDULENT CONVEYANCES—Action to Set Aside —Defenses.—In an action by a judgment creditor to set aside a conveyance as in fraud of creditors, a defense that the deed under which plaintiff claimed title to the property for the rent of which her judgment was recovered had itself been set aside as fraudulent was not available, since defendants, not being creditors of plaintiffs, could not complain of such conveyance.—YETZER v. YETZER, Iowa, 83 N. W. Rep. 889.

43. FRAUDULENT CONVEYANCE—Action to Set Aside.—Where defendant conveyed to his wife and son in undivided moieties, and the conveyance failed as to the son because of failure to deliver the deed, the one-half interest attempted to be conveyed to him remained in the father, and he could declare a homestead therein. —CHAPMAN v. WHITE SEWING MACHINE CO., Miss., 28 South. Rep. 749.

44. FRAUDULENT CONVEYANCES—Intent of Grantee to Defraud.—Where a grantee who is not a creditor of the grantor, but is his surety on a note, induces the grantor to convey certain property to him without any consideration, with the intent of defrauding the creditors of the grantor, which intent is not shared by the latter, and the property is left in his possession, the fraud of the grantee will prevent his maintaining replevin to recover the property from the grantor. —HAYS v. WINDSOR, Cal., 62 Pac. Rep. 395.

45. FRAUDULENT CONVEYANCES—Mortgages of Chattels and Realty.—A mortgage of chattels and realty, which is presumptively void as a chattel mortgage as to creditors for failure to record it as such, but which is recorded as a mortgage of realty, is valid as a real

estate mortgage against judgment creditors, who obtain their judgments after its record, since the whole not being tainted by any actual fraud, though dual in character and governed by different statutory regulations affecting its validity as against mortgagor's creditors, its several parts are separable.—CHEMUNG CANAL BANK v. PAYNE, N. Y., 56 N. E. Rep. 101.

46. FRAUDULENT CONVEYANCES—Tort Claimant.— A creditor, whose claim arises in tort, may attack a conveyance of the debtor's property as being in fraud of creditors.—MCINNIS v. WISCASSET MILLS, Miss., 28 South. Rep. 725.

47. GARNISHMENT—Answer—Sufficiency.—Where it is alleged that the garnishee, on the date of the levy of the execution, was indebted to the principal defendant, for services rendered, in a sum sufficient to satisfy plaintiff's judgment, without any other allegation of facts from which such indebtedness could be deduced as a conclusion of law, the defense of payment need not be affirmatively alleged in the garnishee's answer before it can be proved, but it may be shown under a general traverse.—ROBERTSON v. ROBERTSON, Oreg., 62 Pac. Rep. 877.

48. GUARDIAN AND WARD — Assignment of Note — Action.—Where a note for money due a ward is taken by a guardian in his own name, an assignee of the note may sue thereon in his own name, since the legal title to the note was in the guardian before the transfer, and not in the ward.—JENKINS v. SHERMAN, Miss., 28 South. Rep. 726.

49. INSOLVENCY—Claims—Set-off.—An insolvent company pleaded a debt owing by an insolvent partnership as a set off against a claim of an insolvent partner against the company, the amount of the set-off being larger than the claim. *Held*, that such set-off could not be allowed, as the claim of the insolvent partner was an asset of such insolvent creditor, which must be used to satisfy the demands of his personal creditors before paying the debts of the firm to which he belonged.—VERRY v. CLARK, Mass., 58 N. E. Rep. 151.

50. LANDLORD AND TENANT—Rent.—Where a lessee evicted from a part of the premises by the foreclosure of a prior deed of trust retaining possession of the remainder of the premises, his rent will be apportioned, and he will be required to pay a reasonable proportion of the rent for the land he holds.—CHEAIRS v. COATS, Miss., 28 South. Rep. 728.

51. LIFE INSURANCE — Fraud — Defense. — Where defendant became a member of a mutual insurance company in 1889 by taking a six-year policy, and the company made a general assignment for the benefit of creditors in 1891, and an action was brought on defendant's deposit notes by the assignee in 1897, the fact that the company's agent had misrepresented the condition of the company to defendant at the time of the issuance of his policy constituted no defense to the action, since he waived the fraud by retaining and enjoying the benefits of his contract.—SHERMAN v. FRASIER, Iowa, 83 N. W. Rep. 886.

52. LIMITATIONS — Vendor and Purchaser. — Where a vendor, after the death of the purchaser, took possession of the land sold, an action by the heirs of the purchaser to compel the vendor's heirs to convey the land to them, brought within fifteen years after possession was taken by the vendor, was not barred by limitation.—TRIMBLE v. SPICER, Ky., 58 S. W. Rep. 579.

53. LIMITATION OF ACTIONS—Mortgages—Debtor's removal from State.—Under Code, § 2748, declaring that if, after any cause of action shall have accrued in the State, the person against whom it has accrued shall reside out of the State, the time of his absence shall not be taken as part of the time limited for the commencement of the action, where a note was given in the State, secured by a mortgage on land therein, the period of the debtor's subsequent absence from the State should not be computed as part of the time limited for the enforcement of the security against the land.—HUNT v. BELKNAP, Miss., 28 South. Rep. 751.

54. MANDAMUS — Against Public Officers.—Proceedings by *mandamus* begun against the State comptroller to compel him to audit and draw a warrant upon the State treasury to pay an account claimed by relator against the State will be dismissed where the term of office of the official expires before final decision, and his successor in office is not made a party defendant, or notified to defend the proceedings.—STATE v. BLOXHAM, Fla., 28 South. Rep. 762.

55. MANDAMUS—Sheriff—Execution.—The fact that a party who owns a remainder after the dower interest of his mother in certain land acquires the interest of his mother subsequent to the levy of an execution on the land does not deprive him of his homestead rights, since the acquisition of the additional interest in the property does not devest the judgment creditor of his lien on the property.—WRIGHT v. BOND, N. Car., 37 S. E. Rep. 65.

56. MASTER AND SERVANT—Injury to Servant—Defective Machine.—Where a servant, knowing that a machine is defective, fails to notify his master, and, without knowing that the master has knowledge of its defective condition, operates the machine, and is injured thereby, he cannot recover for such injuries of the master.—THOMAS v. BELLAMY, Ala., 28 South. Rep. 707.

57. MECHANICS' LIENS — Persons Entitled.—Defendant contracted with B for the erection of a building on defendant's homestead. G loaned defendant money, which was used by the latter to pay B for labor and material furnished by him. Defendant and his wife executed their notes for the sum borrowed, and also executed a contract purporting to create a mechanic's lien on the premises in favor of G. Held, that G, not having "furnished labor or material," was not entitled to a mechanic's lien for the sum loaned.—FIRST NAT. BANK OF MUSCOGEE v. CAMPBELL, Tex., 58 S. W. Rep. 628.

58. MORTGAGES—Lien—Crops.—Under a mortgage of land, "together with the rents, issues, and profits thereof," the right of the mortgagor to dispose of the crops growing thereon is not devested by foreclosure proceedings until sale under the decree.—BANK OF WOODLAND v. CHRISTIE, Cal., 62 Pac. Rep. 400.

59. MUNICIPAL CORPORATIONS—Acquisition of Land—Liability for Injuries.—Where a city acquires land for a water basin, and contracts with its former owner to provide a safe and convenient way of travel over or around a discontinued road thereon until a permanent road should be constructed, the contract is admissible, in an action against the city by one injured by its negligence in permitting a former road to get in bad condition, to show that the road was left open for public use.—D'AMICO v. CITY OF BOSTON, Mass., 58 N. E. Rep. 158.

60. MUNICIPAL CORPORATIONS — Bonds—Validity.—When a city pleads *non est factum* as a defense to an action on a coupon bond, the fact that a sinking fund was created by the city, to retire all bonds of the series to which the bond sued on appears to belong, does not establish the validity or identity of such bond.—GALBRAITH v. BOARD OF MAYOR AND ALDERMEN OF KNOXVILLE, Tenn., 58 S. W. Rep. 643.

61. MUNICIPAL CORPORATIONS — Injuries—Defective Street.—A person has a right to go on the driveway of the street for the purpose of placing an article in a conveyance standing on such driveway, and his doing so is not in itself negligence contributory to an injury received from a defect in the driveway.—FINNEGAN v. CITY OF SIOUX CITY, Iowa, 83 N. W. Rep. 907.

62. MUNICIPAL CORPORATION — Sewer—Pollution of Water.—Where a city sued for damages in allowing its sewage to escape into a water course to the damage of a lower riparian owner impleaded the lessees of its sewer farm, charging that the escape of sewage into the water course was due to their negligence, and asking judgment over against them for any liability adjudged against it, in the absence of allegations showing a contractual liability on the part of the lessees to

so care for the sewage as to prevent its escape into the water course the city could not exact indemnity from them, they being mere joint tort-feasors with defendant.—CITY OF SAN ANTONIO v. PIZZINI, Tex., 58 S. W. Rep. 635.

63. MUNICIPAL CORPORATIONS—Street Improvements—Contracts.—A requirement in a street-paving contract that the bidder shall give bond guarantying the work for one year from injury by ordinary use makes the contract and assessment void, as it increases the burdens of the property owner in making it necessary for the contractor to charge a higher price for the work, and is unauthorized by the statute providing for letting of contracts for street improvements.—ALAMEDA MACADAMIZING CO. v. PRINGLE, Cal., 62 Pac. Rep. 394.

64. NEGLIGENCE—Electricity—Fallen Wire—Injuries—Reasonable Care.—In an action for injuries occasioned by a fallen electric wire which had been blown down in a storm, an instruction that the defendant company could not excuse a delay in replacing such wire on the ground that they did not have a sufficient force to replace it sooner was erroneous, since the question whether the company exercised reasonable care was for the jury.—BOYD v. PORTLAND GEN. ELEC. CO., Oreg., 62 Pac. Rep. 378.

65. NEW TRIAL — Misconduct of Jurors.—A verdict cannot be impeached by the testimony or declarations of jurors as to misconduct between them.—STULL v. STULL, Penn., 47 Atl. Rep. 240.

66. PARTNERSHIP — Dissolution—Receiver.—In a suit for the dissolution of a partnership it is proper to appoint a receiver, if necessary to protect the property involved, or if the members of the firm cannot agree on an adjustment.—FLEMING v. CARSON, Oreg., 62 Pac. Rep. 274.

67. PARTNERSHIP — Garnishment.—Where those having a contract for the erection of a building, not being able to complete the same, for want of funds, contracted with creditors that certain persons should take charge of the work, provide the necessary labor and material, and complete the building,—*pro rata* advances to be made by the creditors,—such agreement did not create a partnership.—FEWELL v. AMERICAN SURETY CO., Miss., 28 South. Rep. 755.

68. PLEADING—Corporation—Corporate Existence.—Where defendant, in his answer in an action by an alleged corporation, admitted the execution of the contract sued on, but raised the question of plaintiff's corporate existence, only, by averring lack of knowledge or information sufficient to form belief, the estoppel of defendant's right to deny the corporate existence created by his admission of the contract, if any, was waived by failure to demur to the answer.—LAW GUAR. & TRUST SOC., LIMITED, OF LONDON, v. HOGUE, Oreg., 62 Pac. Rep. 880.

69. PLEDGES — Sale of Property—Bona Fide Purchaser.—Where an attorney, by attaching certain stock held in pledge, becomes aware that the pledgor has an interest above that for which it is pledged, and afterwards sells such stock for the pledgee at public sale to the plaintiff in attachment, without notice to the pledgor, such purchaser cannot hold the stock, on being tendered his bid and interest, on the ground that he is a *bona fide* purchaser, since he is chargeable with the attorney's knowledge of the pledgor's claim.—MCCUTCHEON v. DITTMAN, N. Y., 58 N. E. Rep. 97.

70. PRINCIPAL AND SURETY — Action for Contribution Between Co-Sureties.—Where directors indorse corporate notes with the understanding that the indorsements are joint, and not several, the indorsers between themselves being co-sureties, it is not necessary, to entitle one of them to recover in an action for contribution against another, that there was a contract to sign as co-sureties.—WEEKS v. PARSONS, Mass., 58 N. W. Rep. 157.

71. PUBLIC CORPORATIONS — Contracts — Irrigation Districts.—A person dealing with the officers or agents of a public corporation is required to act with reference to the authority, limitations, and restrictions imposed upon such officers and agents by the legislation authorizing the organization and government of such corporation.—LINCOLN & DAWSON CO. IRR. DIST. v. MCNEAL, Neb., 83 N. W. Rep. 847.

72. PUBLIC LAND—Patents—Boundaries.—A patent in which the outside lines are fixed and certain by courses, distances, and natural objects is not rendered void by the uncertainty of the exclusion from the boundary granted.—WEST v. CHAMBERLAIN, Ky., 58 S. W. Rep. 584.

73. PUBLIC OFFICER—Resignation — Parol Proof.—Where a statute creating a county office does not require a written resignation of an appointee, a resignation and its acceptance by the county commissioners may be shown by parol evidence, over objection that it can only be proved by the commissioners' records.—JOHNSON v. GRISWOLD, Mass., 58 N. E. Rep. 157.

74. RAILROAD COMPANY — Surface Waters. — Under Const. § 242, providing that "municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them," and also independent of the constitution, a railroad company which, in constructing a fill, interrupts the natural drainage of surface water, or, after making a culvert through such a fill, fails to keep it open, so as to flood the premises of an upper proprietor, is guilty of an actionable wrong.—STITH v. LOUISVILLE & N. R. CO., Ky., 58 S. W. Rep. 600.

75. SALES TO CARRIER—Inspection and Rejection.—If no place of delivery is specified in the contract of sale, and there are no circumstances showing a different intent, the general rule is that the articles sold are to be delivered at the place where they are at the time of the sale, and that their delivery to the proper carrier is a delivery to the buyer, and that the title passes to him subject to his right of inspection and rejection of the goods on arrival, if found not to be in accordance with the contract. The buyer, however, unless otherwise agreed, assumes the risk of deterioration in the goods necessarily incident to the course of transportation.—MOBILE FRUIT & TRADING CO. v. MCGUIRE, Minn., 83 N. W. Rep. 833.

76. TAXATION—Payment—Recovery.—Where plaintiff voluntarily paid taxes on certain land in the district of C during the pendency of proceedings to have such land put into the township of G, he could not thereafter recover the taxes so paid on the ground that they were excessive, there being no claim that they were illegal.—ODENDAHL v. RICH, Iowa, 83 N. W. Rep. 886.

77. TRIAL—Evidence—Expert Testimony.—The value of attorney's services, for which an action is brought, cannot be established by requiring the reporter to read the portion of the testimony of a witness relating to the time consumed and the services performed, and then asking an expert to state the value of such services. — FAIRBANKS, MORSE & CO. v. WEEBER, Colo., 62 Pac. Rep. 368.

78. TROVER AND CONVERSION—Measure of Damages.—The measure of damages for conversion of a buggy by one buying from a purchaser under a conditional sale, giving such purchaser the right to use the buggy, is its value at the time of the conversion, not exceeding the amount due under the original contract.—WOODS v. NICHOLS, R. I., 47 Atl. Rep. 211.

79. TRUSTEE — Denial — Compensation.—One cannot claim compensation as trustee where he denied the trust, though he kept the fund safely.—STONE v. FARNHAM, R. I., 47 Atl. Rep. 211.

80. TRUSTS — Conveyances by Trustee.—Where two grantors, each owning an individual moiety in realty, convey it to one of them in trust for the other and certain third parties, imposing no active duties on such trustee, such conveyance, under the statute of uses, passes both the legal and equitable estate of the grantors to such third persons, leaving the trustee

without any title which he can convey as against the latter.—JORDAN V. PHILLIPS & CREW CO., Ala., 28 South. Rep. 734.

81. TRUSTS—Trustee—Qualifications.—Under a testamentary trust to invest a fund and pay over the income, the fact that the estate is being administered under New Jersey court), while the trustee appointed is a Pennsylvania corporation, is not an obstacle to the execution of the trust by the designated trustee, since the trustee may be required to give security within the jurisdiction of the court for due performance of the trust and for accounting before the New Jersey court.—IN RE SATTERTHWAITE'S ESTATE, N. J., 47 Atl. Rep. 227.

82. USURIOUS CONTRACT—Action to Set Aside.—Code, § 2630, providing that usurious contracts cannot be enforced either at law or in equity, except as to the principal sum due, does not prohibit a court of equity, in a suit by a borrower for relief against a usurious contract, from granting such relief on condition that the complainant repay the borrowed money, with legal interest thereon.—LINDSAY V. UNITED STATES SAVINGS & LOAN CO., Ala., 28 South. Rep. 717.

83. USURY—Payment of Usury Under Form of Attorney's Fee.—An attorney's fee paid to a creditor, in addition to legal interest, as a consideration for forbearance in the collection of a judgment, may be recovered as usury paid.—FIDELITY TRUST & SAFETY-VAULT CO. V. RYAN, Ky., 58 S. W. Rep. 610.

84. VENDOR AND PURCHASER—Advancement by Third Person—Vendor's Lien.—Where a third person advances money, at the vendee's request, to his vendor, in payment of the purchase price of realty, without a transfer of the vendor's lien notes, such third person may be subrogated to the vendor's rights, and enforce his lien,—there being no intervening equity,—since equity will keep the lien alive, as though it had been assigned as security for the advancement.—SCOTT V. LAND, MORTGAGE, INVESTMENT & AGENCY CO., LIMITED, OF AMERICA, Ala., 28 South. Rep. 709.

85. VENDOR AND PURCHASER—Contract to Convey—Rescission.—Where a grantee was induced to purchase real estate by the vendor's fraudulent statements respecting water rights appurtenant to the property, such grantee is entitled to maintain a suit to rescind the contract and recover the consideration paid, without waiting until improvements he had undertaken to utilize the water rights had been actually interfered with.—PEERY V. BOYD, Ala., 28 South Rep. 711.

86. VENDOR AND PURCHASER—Contract to Convey Land.—Vendor contracted for the sale of his farm, agreeing to deliver "a deed of such farm, including the stock and tools belonging thereto," for which the purchaser was to pay a part in cash, and give his note secured by a mortgage on the farm for the balance. *Held*, that the agreement to give a mortgage on the farm did not include a mortgage on the stock and tools thereon.—HALLETT V. TAYLOR, Mass., 58 N. E. Rep. 151.

87. VENDOR AND PURCHASER—Payment in Personalty.—Where a vendor in part payment of realty agrees to receive certain personalty, which on demand his vendee refuses to deliver, his remedy is a recovery of the possession of the personalty by replevin, or an action for its value, and not an action to recover the purchase price of the land.—CHAMBERLAIN V. WOLF, Iowa, 83 N. W. Rep. 893.

88. VENDOR AND PURCHASER—Purchase Money—Conveyance to Lender.—When a vendee of land is in possession under a bond for title, and, being indebted to the vendor for a balance of the purchase money, procures a third person to pay such balance to the creditor, agreeing that such third person shall receive from the vendor title to the land in his own name, and hold it until the debtor shall have paid to him the full amount so advanced, such vendee is, immediately on the payment of such balance, entitled to a conveyance of the land, and a verbal agreement that the deed so held shall be security for certain supplies thereafter to be furnished is invalid and cannot be enforced.—PIERCE V. PARRISH, Ga., 37 S. E. Rep. 80.

89. WAREHOUSEMEN — Contract — Damage — Negligence.—Where a warehouseman contracted to deliver wheat, damage by the elements excepted, it was no defense to an action for the warehouseman's failure to deliver the wheat on demand that it had been partly destroyed and partly damaged by fire of incendiary origin, without negligence on the part of defendant, since the exception, "damage by elements excepted," should be construed as synonymous with "act of God."—POPE V. FARMERS' UNION & MILLING CO., Cal., 62 Pac. Rep. 384.

90. WATERS—Irrigation—Storage—Priorities.—Where defendant completed its storage reservoirs several years before plaintiff commenced the construction of its reservoir, the fact that plaintiff's ditch was first built, and had a priority of water for irrigation over defendant's ditches, and was originally part of a plan which included a storage reservoir, does not permit plaintiff to tack its storage use onto its irrigation use, so as to give its reservoirs priority over those of defendant, since priority of water for irrigation use does not carry priority for storage use, but to gain such storage priority plaintiff must have completed its whole plan with reasonable diligence.—NEW LOVELAND & GREELEY IRRIGATION & LAND CO. V. CONSOLIDATED HOME SUPPLY DITCH & RESERVOIR CO., Colo., 62 Pac. Rep. 366.

91. WATERS—Liability of Railroad Company for Changing Flow.—Under Const. § 242, providing that "municipal and other corporations, and individuals invested with the privilege of taking private property for public use, shall make just compensation for property taken, injured or destroyed by them," a railroad company is liable for the flooding of plaintiff's land by the construction of a culvert under its track, which was made necessary by the accumulation of surface water resulting from the construction of a platform by defendant changing the natural flow of the water, and this is true whether the common law rule or the civil law rule as to surface waters prevails in Kentucky.—LOUISVILLE & N. R. CO. V. BRINTON, Ky., 58 S. W. Rep. 604.

92. WATERS AND WATER COURSES—Pollution by Salt Mining—Injunction.—Where a salt manufacturer adjacent to a flowing stream draws water therefrom in such quantity as to diminish its flow, and in using it in his operations renders the rest of the stream so salty as to unfit it for use by lower riparian owners, such use of the stream is such an unreasonable one as entitles lower riparian owners to restrain it, since they are entitled to a fair participation in the use of such water, which cannot be abridged by the convenience or necessity of the business of an upper riparian owner.—STROBEL V. KERR SALT CO., N. Y., 58 N. E. Rep. 142.

93. WILLS—Probate—Foreign Wills.—A nuncupative will by notarial act, executed in the State of Louisiana by writing the same on the records of the notarial acts of a notary—the records being by the laws of that State irremovable therefrom—was not revoked by the removal of the testatrix to the State of Mississippi.—PRATT V. HARGRAVES, Miss., 28 South. Rep. 722.

94. WILLS—Property Bequeathed—Merger.—A testator directed a transfer to a trustee of all his stock in a certain company, which was not to be sold until his wife's death, and, after directing a sale of the rest of his property, expressed a determination that his interest in such company be retained during his wife's life, and the dividends paid to her. By a codicil he confirmed his will, except as to such stock, which he gave to his wife. Held, that loan certificates of such company, belonging to testator, and partaking of the nature of stock, passed under such codicil to the wife, since such certificates were a part of the investment reserved to the wife, and presumably were included in the codicil.—IN RE CONLEY'S ESTATE, Penn., 47 Atl. Rep. 238.